U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 20 July 2004

BALCA Case No.: 2003-INA-178
ETA Case No.: P2002-NJ-02488113

In the Matter of:

RAY SAOUD FARMS, INC.,
Employer,

on behalf of

SEGUNDO TOALONGO,
Alien.

Appearance: Micaela Alvarez, Esquire
Union City, New Jersey
For the Employer and the Alien

Certifying Officer: Delores DeHaan
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a United States Department of Labor Certifying Officer ("CO") of his application for alien labor certification. Permanent alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification, and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 16, 2001, the Employer filed an application for labor certification on behalf of the Alien to fill the position of Warehouse Supervisor. (AF 9-12). The job duties for the position included overseeing warehouse work, supervising activities of workers engaged in loading and unloading freight, and training new workers. (AF 9). The Employer required two years of experience in the job offered. (AF 12).

The CO issued a Notice of Findings ("NOF") on January 14, 2003, proposing to deny certification on grounds that the Employer violated 20 C.F.R. §§ 656.21(b)(5)–(b)(6) and 656.21(j). (AF 158-162). Specifically, the CO concluded that the Employer violated 20 C.F.R. § 656.21(b)(5) by requiring that U.S. applicants possess two years of experience in the job offered, while the Alien lacked such experience when originally hired by the Employer. (AF 160-161). The CO further found that the Employer failed to provide proper written documentation of contact with U.S. applicants in contravention of 20 C.F.R. § 656.21(j), or to proffer legitimate reasons as to why qualified U.S. applicants were rejected from the job opportunity. (AF 158-160). The CO noted that fifty-five applicants appeared qualified for the position, but were rejected. The Employer submitted annotated employment applications for only sixteen of the rejected applicants. The Employer rejected the sixteen applicants either generally as being "unqualified," or specifically for lack of experience, time conflicts, or physical inability to work in sub-zero temperatures or to do "heavy work." (AF 158).

The Employer responded in a timely rebuttal consisting of a sworn statement that the Alien had experience in his country regarding the kind of work offered; that the Alien demonstrated capacity to supervise and was always willing to do any heavy lifting; and finally, that all the applicants interviewed refused to perform any heavy lifting activities or to work in sub-zero temperatures. (AF 163-164).

The CO reviewed the Employer's rebuttal and denied the application for labor certification by Final Determination ("FD") dated March 3, 2003. The CO noted that the Employer had violated 20 C.F.R. §§ 656.21(b)(5)-(6) and 656.21(j). (AF 166-168). The

Employer subsequently filed a timely Request for Administrative Review dated April 3, 2003. (AF 359-61).

DISCUSSION

Twenty C.F.R. § 656.21(b)(5) requires an employer to document either: (1) that its requirements for the job opportunity as described represent the employer's "actual minimum requirements" for the job opportunity; or (2) that it is not feasible to hire workers with less training or experience than that required by the job offer. 20 C.F.R. § 656.21(b)(5). An employer must prove that it has not hired workers with less training or experience for the job at issue or for similar positions. *Jackson and Tull Engineers,* 1987-INA-547 (Nov. 24, 1987) (*en banc*). That is, an employer may not require more experience of U.S. workers than the alien possesses. *Western Overseas Trade and Development Corp.,* 1987-INA-640 (Jan. 27, 1988); *Wings Wildlife Productions, Inc.,* 1990-INA-69 (Apr. 23, 1991) (*employer must establish specifically that the alien possesses the minimum requirements for the position*). The rationale behind the regulation is to prevent an employer from requiring more stringent qualifications of U.S. workers than it requires of an alien; an employer is not allowed to treat an alien more favorably than a U.S. worker. *La Romagnola West,* 1995-INA-28 (Oct. 3, 1996) (*citing ERF Inc. d/b/a Bayside Motor Inn,* 1989-INA-105 (Feb. 14, 1990)). Accordingly, certification is properly denied under 20 C.F.R. § 656.21(b)(5) where the alien does not meet the employer's stated job requirements. *Marston & Marston Inc.,* 1990-INA-373 (Jan. 7, 1992).

In the instant case, in the NOF, the CO noted that the Employer required two years of experience in the job offered, yet the Alien had no such experience when he was hired. The CO thus directed the Employer to submit evidence that the Alien did in fact have the required two years of experience when hired by the Employer, or to provide documentation why it is infeasible to hire workers with less qualification than those now being required. (AF 160-162). The CO further instructed the Employer that he could delete the requirement. (AF 160-161).

The Employer's rebuttal consisted of a sworn statement that the Alien was hired "because he possessed experience in his country regarding this kind of work. He worked in Ecuador as an

Assistant of Storage, in this job he was in charge of inventory and main stock. He also assisted in work supervision so that work met specifications." (AF 164). The Employer further stated that the Alien, upon first working with the company, had "demonstrated capacity to supervise other employees," and later had "become a very important element for the growth of this company." (AF 163). In the FD, the CO noted that the Employer's rebuttal did not address the 20 C.F.R. § 656.21(b)(5) issue. (AF 167).

The Employer fails to prove that the Alien possessed two years of experience in all the duties now required of U.S. applicants. The Alien's prior work experience, as indicated on the ETA 750B, consisted solely of assisting his superiors in various aspects of the construction business, and inspecting work in progress. (AF 9). The Warehouse Supervisor position, on the other hand, requires the supervision, coordination, and management of workers engaged in loading and other aspects of the freight delivery business. (AF 12). The Employer offers no evidence that the Alien, while employed in his job under the title "Assistant of Storage/Messenger," performed the range of supervisory job duties now required by the Employer. *See, e.g., Software Systems, Inc.,* 1988-INA-200 (July 6, 1988) (*experience in the job offered means experience in performing the listed job duties*). Since the lack of such experience would have been sufficient reason to reject U.S. applicants, such requirements are unlawful and in violation of 20 C.F.R. § 656.21(b)(5).

Furthermore, assuming that the Alien gained the required experience while working for the Employer, the Employer failed to demonstrate that the job in which the Alien gained experience was not similar to the job offered for certification. In fact, the Alien's experience with the Employer is identical to the duties for the petitioned position. (*compare* AF 9 *with* AF 12). The Employer also failed to document why it is not now feasible to train a U.S. applicant as it trained the Alien. That the Alien, according to the Employer, has "become a very important element for the growth of this company," is insufficient to demonstrate infeasibility. *See, e.g., MMMats, Inc.,* 1987-INA-540 (Nov. 24, 1987) (*en banc*) (*an employer's bare statement of infeasibility to train does not satisfy burden of proof*).

We agree with the CO that the Employer violated 20 C.F.R. § 656.21(b)(5) by failing to list the actual minimum requirements for the job. Accordingly, labor certification was properly denied and it is not necessary to reach the other issues.

ORDER

The CO's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.